

1999

# The State of Utah v. Linda Marjorie Fuller : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Kent R. Hart, Scott Williams; Salt Lake Legal Defender Assoc.; counsel for appellee.

Mark L. Shurtleff; attorney general; counsel for appellant.

---

## Recommended Citation

Brief of Appellee, *Utah v. Fuller*, No. 990930 (Utah Court of Appeals, 1999).

[https://digitalcommons.law.byu.edu/byu\\_ca2/2395](https://digitalcommons.law.byu.edu/byu_ca2/2395)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH :  
 :  
 Plaintiff/Appellant :  
 :  
 v. :  
 :  
 LINDA MARJORIE FULLER : Case No. 990930-CA  
 : Priority No. 15  
 Defendant/Appellee :  
 :

---

**BRIEF OF APPELLEE**

Appeal, by the State, from an order quashing a bind over and dismissing an Information that charged Appellee Linda Marjorie Fuller with forgery, a third degree felony, in violation of Utah Code Annotated section 76-6-501 (1999), and theft by deception, a class A misdemeanor, in violation of Utah Code Annotated section 76-6-405 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Robert Hilder, Judge, presiding.

KENT R. HART (6242)  
SCOTT WILLIAMS (6687)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, UT 84111  
Attorneys for Appellee

MARK SHURTLEFF (4666)  
**ATTORNEY GENERAL**  
Heber M. Wells Building  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
Attorney for Appellant

**FILED**  
Utah Court of Appeals

MAY 18 2001

Paulette Stagg  
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH :  
Plaintiff/Appellant :  
v. :  
LINDA MARJORIE FULLER : Case No. 990930-CA  
Priority No. 15  
Defendant/Appellee :

---

**BRIEF OF APPELLEE**

Appeal, by the State, from an order quashing a bind over and dismissing an Information that charged Appellee Linda Marjorie Fuller with forgery, a third degree felony, in violation of Utah Code Annotated section 76-6-501 (1999), and theft by deception, a class A misdemeanor, in violation of Utah Code Annotated section 76-6-405 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Robert Hilder, Judge, presiding.

KENT R. HART (6242)  
SCOTT WILLIAMS (6687)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, UT 84111  
Attorneys for Appellee

MARK SHURTLEFF (4666)  
**ATTORNEY GENERAL**  
Heber M. Wells Building  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
Attorney for Appellant

## **TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
JURISDICTION AND NATURE OF THE PROCEEDINGS .....	1
STATEMENT OF THE ISSUE, STANDARD OF REVIEW AND PRESERVATION OF THE ARGUMENTS .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS .....	2
STATEMENT OF THE CASE .....	4
STATEMENT OF THE FACTS .....	5
SUMMARY OF THE ARGUMENT .....	8
ARGUMENT	
THE STATE FAILED TO ESTABLISH PROBABLE CAUSE BECAUSE THE EVIDENCE DOES NOT SUPPORT A REASONABLE BELIEF THAT MS. FULLER KNEW OF THE FORGERY, THE MERE POSSESSION OF A STOLEN, FORGED CHECK DOES NOT SUPPORT GUILTY KNOWLEDGE, AND, IN ANY EVENT, SUCH AN INFERENCE VIOLATES BASIC CONSTITUTIONAL RIGHTS. ....	10
A. The Cursory Evidence Does Not Establish a Reasonable Inference that Ms. Fuller Knew of the Forgery. ....	11
B. Guilty Knowledge Cannot Be Inferred from the Mere Presentment of a Stolen, Forged Check. ....	14
C. Fundamental Constitutional Rights Require Evidence of the Defendant's Mental State. ....	16
CONCLUSION .....	21

## TABLE OF AUTHORITIES

### Page

### CASES

<u>Albrecht v. State</u> , 486 S.W.2d 97 (Tex. Crim. App. 1972) .....	17
<u>Coffin v. United States</u> , 156 U.S. 432 (1895) .....	18
<u>Davis v. United States</u> , 160 U.S. 469 (1895) .....	19
<u>Heath v. State</u> , 382 So. 2d 391 (Fla. Ct. App. 1980) .....	17
<u>Jaeger and Branch, Inc. v. Pappas</u> , 433 P.2d 605 (Utah 1967) .....	19
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966) .....	20
<u>Morissette v. United States</u> , 342 U.S. 246 (1952) .....	21
<u>Parks v. State</u> , 746 S.W.2d 738 (Tex. Crim. App. 1987) .....	20
<u>People v. Mathis</u> , 630 N.Y.S.2d 793 (App. Div. 1995) .....	17
<u>State v. Allegra</u> , 533 A.2d 338 (N.H. 1987) .....	17
<u>State v. Anderson</u> , 612 P.2d 778 (Utah 1980) .....	11
<u>State v. Castonguay</u> , 663 P.2d 1323 (Utah 1983) .....	17
<u>State v. Clark</u> , 2001 UT 9, 20 P.3d 300 .....	2, 5, 9, 11, 13, 14, 15, 16
<u>State v. Goddard</u> , 871 P.2d 540 (Utah 1994) .....	16
<u>State v. Graves</u> , 717 P.2d 717 (Utah 1986) .....	18
<u>State v. Hester</u> , 2000 UT App 159, 3 P.3d 725 .....	11

	Page
<u>State v. Kihlstrom</u> , 1999 UT App 289, 988 P.2d 949 .....	14, 15, 17, 18, 19
<u>State v. Lamm</u> , 606 P.2d 229 (Utah 1980) .....	17
<u>State v. Martin</u> , 341 N.W.2d 728 (Iowa 1983) .....	17
<u>State v. Maxwell</u> , 391 P.2d 560 (Ariz. 1964) .....	17
<u>State v. Mulholland</u> , 300 A.2d 271 (R.I. 1973) .....	17
<u>State v. Phillips</u> , 412 P.2d 205 (Mont. 1966) .....	17
<u>State v. Pledger</u> , 896 P.2d 1226 (Utah 1995) .....	11
<u>State v. Ravenna</u> , 557 A.2d 484 (Vt. 1988) .....	17, 19
<u>State v. Scoby</u> , 810 P.2d 1358 (Wash. 1991) .....	17
<u>State v. Tomlinson</u> , 457 So. 2d 651 (La. 1984) .....	17
<u>State v. Williams</u> , 712 P.2d 220 (Utah 1985) .....	14, 15, 16
<u>Taylor v. State</u> , 88 P.2d 665 (Okla. Crim. App. 1939) .....	17
<u>Thacker v. Commonwealth</u> , 114 S.E.2d 504 (Va. 1922) .....	17
<u>In re Winship</u> , 397 U.S. 358 (1970) .....	19

#### STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-6-405 (1999) .....	1, 3, 14
Utah Code Ann. § 76-6-501 (1999) .....	1, 2, 3, 12
Utah Code Ann. § 77-18a-1(2)(a) (1999) .....	1

	<u>Page</u>
Utah R. App. P. 29(b) .....	2
Utah R. Crim. P. 7(h)(2) .....	11
U.S. Const. Amend. V .....	4, 19, 21
U.S. Const. Amend. XIV .....	4, 21
Utah Const. art. I, § 7 .....	4, 21
Utah Const. art. I, § 12 .....	4, 21

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH	:	
Plaintiff/Appellant	:	
v.	:	
LINDA MARJORIE FULLER	:	Case No. 990930-CA
Defendant/Appellee	:	Priority No. 15

---

**JURISDICTION AND NATURE OF THE PROCEEDINGS**

This is an appeal, by the State, from an order quashing a bind over and dismissing an Information that charged Appellee Linda Marjorie Fuller with forgery, a third degree felony, in violation of Utah Code Annotated section 76-6-501 (1999), and theft by deception, a class A misdemeanor, in violation of Utah Code Annotated section 76-6-405 (1999). This Court has jurisdiction under Utah Code Annotated section 77-18a-1(2)(a) (1999) which allows the State to appeal from "a final judgment of dismissal[.]"<sup>1</sup>

---

<sup>1</sup>In the caption of its brief, the State lists this appeal as having second priority for oral argument purposes. But, because Rule of Appellate Procedure 29(b) does not assign a priority number to State's appeals from orders of dismissal, this appeal has lowest priority under subsection (15) of that rule.



**STATEMENT OF THE ISSUE, STANDARD OF REVIEW AND  
PRESERVATION OF THE ARGUMENTS**

Utah Code Annotated section 76-6-501(1) (1999) defines forgery as uttering a check "with purpose to defraud anyone, or with knowledge that he [or she] is facilitating a fraud." The evidence showed that Ms. Fuller cashed a \$300 check for upholstery work which she performed, the check later turned out to be stolen and forged, Ms. Fuller could not remember who gave her the check 15 months after receiving it, and she had no license for her upholstery business. Does this evidence support a reasonable inference that Ms. Fuller knew of the forgery?

"The determination of whether to bind a criminal defendant over for trial is a question of law" which this Court reviews without deference to the trial court. State v. Clark, 2001 UT 9, ¶ 8, 20 P.3d 300. This issue is preserved at R. 19-25; 77: 38-40; 78.<sup>2</sup>

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

Utah Code Annotated section 76-6-501 (1999) provides:

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

- (a) alters any writing of another without his authority or utters any such altered writing; or
- (b) makes, completes, executes,

---

<sup>2</sup>Volume 77 contains the preliminary hearing transcript. Volume 78 contains the transcript on the hearing to quash the bind over. The internal page numbers of those volumes are listed after "R." and the volume number.

authenticates, issues, transfers, publishes or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section, "writing" includes printing, electronic storage or transmission, or any other method of recording valuable information including forms such as:

(a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money and any other symbols of value, right, privilege, or identification;

(b) a security, revenue stamp, or any other instrument or writing issued by a government or any agency; or

(c) a check, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(3) Forgery is a felony of the third degree.

Utah Code Annotated 76-6-405 (1999) defines the crime of theft by deception:

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law[.]"

Section one of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article One, section seven of the Utah Constitution similarly provides that "No person shall be deprived of life, liberty or property, without due process of law."

Article One, section 12 of the Utah Constitution similarly provides in pertinent part: "In criminal prosecutions . . . [t]he accused shall not be compelled to give evidence against himself[.]"

### **STATEMENT OF THE CASE**

On July 31, 1998, the State charged Ms. Fuller with the crimes of forgery and theft by deception. R. 2. The trial court conducted a preliminary hearing on May 27, 1999. R. 77. The trial court found sufficient evidence to bind the case over for trial on both charges. R. 77: 41.

On August 5, 1999, Ms. Fuller filed a motion to quash the bind over. R. 19. The State did not respond to the motion. R. 64. The trial court conducted a hearing on the motion on September 13, 1999. R. 78. The hearing judge quashed the bind over and dismissed the charges. R. 22. The hearing judge filed a written order of dismissal on October 14, 1999. R. 64-67. The State filed a notice of appeal on October 28, 1999. R. 69.

On March 30, 2000, the State filed its opening brief on appeal. On April 7, 2000, Ms. Fuller filed a motion to hold this appeal in abeyance and to stay the briefing schedule pending the Utah Supreme Court's deliberations in the consolidated cases, State v. Clark, No. 990368, and State v. Smith, No. 990798. This Court granted the motion on April 21, 2000. The Utah Supreme Court decided Clark and Smith on February 6, 2001. This Court then reinstated the briefing schedule in this appeal on April 18, 2001.

### **STATEMENT OF THE FACTS**

Between the end of March of 1997 and April 6, 1997, Steven Allred was helping his mother move when he unknowingly threw numerous of his personal checks into a dumpster. R. 77: 20-22. On April 8, 1997, Ms. Fuller entered the Bank One branch at 1295 South and Redwood Road in Salt Lake City and presented a cash for \$300 for cashing. R. 77: 5-6. The check was drawn from Mr. Allred's account at Bank One, included a signature that purported to be Mr. Allred's, and was payable to Ms. Fuller. R.

77: 6. In the space provided for describing any notations relating to the check was written "upholstery." R. 78: 21.

Ms. Fuller indorsed the check in the bank teller's presence and presented a valid Utah Driver's License. R. 77: 8, 11. The teller compared Ms. Fuller's indorsement on the check with the signature on the driver's license and found that they matched. R. 77: 8-9. Because Ms. Fuller did not have an account at Bank One, the teller requested Ms. Fuller to place a clear fingerprint on the check and Ms. Fuller willingly complied. R. 77: 7, 9.

The teller inspected Mr. Allred's account and found that it contained sufficient funds to cash the check. R. 77: 9-10. Additionally, the bank's computer system gave no indication that the check was invalid in any way. R. 77: 10. Ms. Fuller acted calmly and the teller believed that the transaction was entirely normal. R. 77: 9. Accordingly, the teller gave Ms. Fuller \$300 in cash. R. 77: 6.

About 45 minutes later, another person entered the bank and cashed one of Mr. Allred's missing checks. R. 77: 34. According to Mr. Allred, he lost between 50 to 100 of his personal checks. R. 77: 24. None of these other checks, including the one cashed just after Ms. Fuller entered the bank, were linked to her in any way. R. 77: 24, 34.

Six days later, Bank One notified Mr. Allred that his account was overdrawn. R. 77: 23. He then realized for the first time that he had mistakenly discarded the checks. Mr. Allred did not know Ms. Fuller, he did not fill out the check or sign his name, nor did

he authorize anyone else to do so. R. 77: 21.

Fifteen months after the cashing of the check, police detective Brent Gruber telephoned Ms. Fuller at her home. R. 77: 27, 30-32. Ms. Fuller cooperated with Det. Gruber, informed him that she remembered cashing the check, and stated that the check was payment for her work upholstering a sofa. R. 77: 28, 30-34. Ms. Fuller indicated that she could not remember the man who had given her the check, she probably could not identify him, and she had no identifying information about him. R. 77: 28-29, 36. She only remembered that "they" drove a truck. R. 77: 33. Ms. Fuller added that she did not have a business license for her upholstery activities. R. 77: 32-33.

After speaking with Ms. Fuller, Det. Gruber confirmed that Ms. Fuller did not have a business license but he conducted no further investigation. R. 77: 33. Based on his investigation, Det. Gruber recommended Ms. Fuller's arrest. R. 77: 32-34. The district attorney agreed and charged Ms. Fuller with forgery and theft by deception. R. 2; 77: 32.

The trial court conducted a preliminary hearing and bound Ms. Fuller over for trial. R. 77: 41. Ms. Fuller challenged the bind over in a motion to quash. R. 19. She contended that the evidence did not support a reasonable inference that she knew of the forgery or that she intended to defraud anyone. R. 22. The State did not respond to the motion. R. 64.

The trial court conducted a hearing and granted the motion to quash. R. 78: 22-24.

The hearing judge rejected the State's contention that "the fact that Ms. Fuller doesn't appear to be in the upholstery business and cannot identify a customer is enough to get it bound over." R. 78: 8. Instead, the judge concluded that these facts amounted to "speculation . . . not credible evidence" that Ms. Fuller knew of the forgery. R. 78: 10. Even viewing the evidence "in the most favorable light, and . . . giving the State every benefit," the hearing judge ruled that the State presented "a dearth of facts that support anything resembling intent." R. 78: 22-23. If anything, the lack of a business license and Ms. Fuller's inability to remember a customer were consistent with persons who operate unlicensed, small-scale businesses that have irregular clientele. R. 78: 10, 23-24. The hearing judge concluded that the State only presented "nothing more than a suspicion articulated by a[] [police] officer based on inadequate or a skimpy investigation, but a suspicion, no evidence." R. 78: 23. The State appealed the hearing judge's decision to this Court. R. 69.

### **SUMMARY OF THE ARGUMENT**

The evidence fails to establish probable cause that Ms. Fuller knew of the forgery or had an intent to defraud. The Utah Supreme Court recently held that to establish probable cause the State must present evidence from which a reasonable belief can be inferred that the defendant committed a crime. Here, the evidence showed Ms. Fuller's innocence. She cashed a check truthfully representing herself to be the payee, she was

not nervous, she willingly provided valid identification and gave a fingerprint, the account had sufficient funds, and the check appeared valid. Even the teller admitted that the transaction appeared entirely normal.

The State argued that it had established probable cause because: (1) Ms. Fuller could not remember the man who gave her the check 15 months after he had paid for upholstery work she had performed; and, (2) she did not have a business license to do upholstery work. These facts may show a faded memory and poor business acumen but do not indicate knowledge of the forgery. If anything, these facts support Ms. Fuller's innocence. Specifically, the check included a notation that the payment was for upholstery work and unlicensed business people commonly have irregular clientele and do not keep records. The only way to infer guilt would require an assessment of Ms. Fuller's credibility which the law plainly forbids in determining probable cause.

Contrary to the State's claims, guilt cannot be inferred from the mere possession of a stolen, forged check under Utah case law. In State v. Clark, 2001 UT 9, 20 P.3d 300, the Utah Supreme Court specifically declined to address the merits of the State's mere possession argument. The most this Court can draw from Clark is that the facts of that case supported probable cause. But, this case is clearly distinguishable from Clark. Contrary to that case, Ms. Fuller gave no indication that she knew of the forgery and she had no connection to the theft of the checks in any way. Even the case law prior to Clark fails to support the State's claim.



Inferring guilt from possession alone also violates numerous principles of criminal law as well as fundamental constitutional rights. Under Utah law, intent cannot be inferred from conduct alone. Further, basing probable cause on mere possession would allow the State to charge any person in a check's chain of custody with a crime. This approach would also defeat the presumption of innocence, shift the burden of proof to the defense, compel defendants to forfeit their right to silence to explain the possession, and create a strict liability offense.

### **ARGUMENT**

**THE STATE FAILED TO ESTABLISH PROBABLE CAUSE BECAUSE THE EVIDENCE DOES NOT SUPPORT A REASONABLE BELIEF THAT MS. FULLER KNEW OF THE FORGERY, THE MERE POSSESSION OF A STOLEN, FORGED CHECK DOES NOT SUPPORT GUILTY KNOWLEDGE, AND, IN ANY EVENT, SUCH AN INFERENCE VIOLATES BASIC CONSTITUTIONAL RIGHTS**

Based on the cursory evidence presented below, no reasonable inference can be drawn that Ms. Fuller knew of the forged check and that she intended to defraud the bank. Under the relevant case law, the State cannot support its argument that the mere possession of a stolen, forged check establishes probable cause of guilt. In any event, basic constitutional rights bar the State from relying on possession alone to supply the requisite knowledge and intent for the crimes of forgery and theft by deception.

**A. The Cursory Evidence Does Not Establish a Reasonable Inference that Ms. Fuller Knew of the Forgery**

The hearing judge correctly concluded that the State failed to establish probable cause that Ms. Fuller knew of the forgery. In fact, the reasonable inferences drawn from the evidence indicate that Ms. Fuller was an innocent victim.

To bind a defendant over for trial, the State must establish probable cause that a crime has been committed and that the defendant committed it. State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995); Utah R. Crim. Proc. 7(h)(2). "In making a determination as to probable cause, the magistrate should view the evidence in a light most favorable to the prosecution and resolve all reasonable inferences in favor of the prosecution." Pledger, 896 P.2d at 1229. Magistrates may not weigh the evidence or assess the credibility of witnesses, but must leave these tasks to the trier of fact at trial. State v. Clark, 2001 UT 9, ¶ 10, 20 P.3d 300. Although the magistrate's role is limited, it "is not that of a rubber stamp for the prosecution." Id. (quoting State v. Hester, 2000 UT App 159, ¶ 7, 3 P.3d 725). Rather, the magistrate must "ensure that all 'groundless and improvident prosecutions' are ferreted out no later than the preliminary hearing." Hester, 2000 UT App 159, ¶ 7, 3 P.3d 725 (quoting State v. Anderson, 612 P.2d 778, 783-84 (Utah 1980)).

The Utah Supreme Court recently clarified the standard for establishing probable cause at preliminary hearings. In Clark, the Supreme Court reviewed its case law and

concluded that it had rendered confusing decisions on the level of proof required to bind a case over for trial. 2001 UT 9, ¶¶ 11-14, 20 P.3d 300. The Supreme Court clarified that the quantum of evidence was the same as that for obtaining an arrest warrant. Id. at ¶ 16. Specifically, the State must show sufficient evidence "to support a reasonable belief that an offense has been committed and that the defendant committed it." Id. at ¶ 16.

Although the evidence plainly shows a forgery occurred, the State failed to meet its burden of establishing a reasonable inference that Ms. Fuller had knowledge of the forgery or had an intent to defraud. The crime of forgery required the State to show that Ms. Fuller uttered the check "with purpose to defraud anyone, or with knowledge that he [or she] [was] facilitating a fraud[.]" Utah Code Ann. § 76-6-501(1) (1999). Rather than showing such knowledge or intent, she represented to be no one other than herself when Ms. Fuller cashed the check. Moreover, she indorsed her own name, produced a valid Utah driver's license, and willingly affixed her fingerprint on the check.

Likewise, as the teller stated, the presentment of the check raised no suspicions and appeared to be a normal transaction. Ms. Fuller was not nervous and she fully cooperated with the teller's requests, including willingly indorsing the check and providing a fingerprint. The indorsement on the check matched the signature of Ms. Fuller's driver's license. The account contained sufficient funds and there was no indication in the bank's computer system that the check was invalid. In fact, the teller first learned of a problem with the check when she was subpoenaed months after the

transaction.

As the State conceded below, the only evidence from which knowledge or intent could possibly be inferred was Ms. Fuller's failure to remember who gave her the check and the fact that she did not have a business license. R. 78: 7-8. Ms. Fuller's inability to remember a person that she met one time 15 months previously is, at best, inconclusive. Further, as the hearing judge concluded, persons who operate small-scale businesses out of their homes commonly do not have regular clientele and do not obtain business licenses. Antique dealers, collectors, and crafters readily come to mind. As the hearing judge ruled, this evidence is simply too "skimpy" upon which to base probable cause. R. 78: 24.

In imputing knowledge of the forgery to Ms. Fuller, the State simply speculated below about Ms. Fuller's motives and responses to Det. Gruber's questions. Although the absence of business records and a business license may show Ms. Fuller is a poor business person, they do not reasonably indicate knowledge of the specific forgery here. To infer such knowledge would require a conclusion that Ms. Fuller lacked credibility. But, when determining probable cause to bind a case over, courts cannot consider credibility issues. Clark, 2001 UT 9, ¶ 10, 20 P.3d 300. Rather, they must objectively view the evidence to determine whether a reasonable belief exists that a person committed a crime. Id. at ¶ 16. Because the evidence here reasonably supports Ms. Fuller's innocence rather than her guilt, the State failed to meet its burden of proof for

forgery. Similarly, the State's failure to show knowledge of the forgery prevented it from establishing probable cause of a "purpose to deprive" a person of property as required for the crime of theft by deception. Utah Code Ann. § 76-6-405(1) (1999).

**B. Guilty Knowledge Cannot Be Inferred from the Mere Presentment of a Stolen, Forged Check**

On appeal, the State contends that the mere presentment of a stolen, forged check reasonably shows criminal knowledge. State's brief at 8 (citing State v. Kihlstrom, 1999 UT App 289, ¶ 13, 988 P.2d 949). But, the Supreme Court's recent decision in Clark casts doubt on this assertion. In that case, the Supreme Court noted this Court's conclusion in Kihlstrom that State v. Williams, 712 P.2d 220 (Utah 1985), stood for the proposition that "'a person who merely utters a forged instrument can be inferred to have had knowledge of the forgery.'" Clark, 2001 UT 9, ¶ 18 n.4, 20 P.3d 300 (quoting Kihlstrom, 1999 UT App 289, ¶ 13, 988 P.2d 949)). In both Williams and Kihlstrom, the evidence merely showed that the defendants cashed checks that some unknown persons had stolen and forged and that the owners of the checks did not know the defendants nor authorize anyone to make checks payable to them. Williams, 712 P.2d at 223; Kihlstrom, 1999 UT App 289, ¶¶ 14, 988 P.2d 949. The appellants in Clark urged the Supreme Court to overrule Williams and Kihlstrom. Clark, 2001 UT 9, ¶ 18 n.4, 20 P.3d 300.

The Supreme Court neither reaffirmed nor overruled Williams. Instead, it simply

noted the parties' requests to elucidate on that opinion and stated that "[w]e decline the invitation to reconsider Williams." Clark, 2001 UT 9, ¶ 18 n.4, 20 P.3d 300.

Given the ambiguous status of Williams and Kihlstrom's interpretation of it, the Supreme Court's opinion in Clark appears to define the current state of the law. That case is clearly distinguishable from Ms. Fuller's conduct. In Clark, both defendants cashed checks that had been stolen and forged on the same day that the defendants presented them at a bank. 2001 UT 9, ¶¶ 3, 6, 20 P.3d 300. When both defendants realized that a problem with the accounts existed, they left the bank without explanation, leaving the checks behind. Id. at ¶¶ 4, 6. The Supreme Court concluded that, "in light of the timing," these facts led to the reasonable inference that defendants "either stole the checks or knew they were stolen." Id. at ¶ 20.

Here, the checks were stolen at least two days and possibly more than a week before Ms. Fuller cashed the check. R. 77: 20-22. Further, although up to 100 checks were stolen, none of them were ever linked to Ms. Fuller during the 15 months after the theft. Thus, contrary to the defendants in Clark, the "timing" of the theft does not reasonably connect Ms. Fuller to the forgery. Clark, 2001 UT 9, ¶ 20, 20 P.3d 300.

Likewise, contrary to the circumstances in Clark, Ms. Fuller's actions and demeanor did not indicate knowledge of the forgery. As the bank teller confirmed, Ms. Fuller fully cooperated, she was not nervous, and her behavior raised no suspicions. Moreover, the account had sufficient funds, there was no hold placed on the check, and

the transaction appeared completely routine. There was, thus, no reasonable basis for inferring that Ms. Fuller knew anything about the theft or the forgery.

Even if Williams applied, that case does not support a finding of probable cause in this case. That appeal involved a challenge to the sufficiency of the evidence. In considering the evidence supporting a conviction, appellate courts conduct a highly deferential review of the evidence and reverse a conviction only "when the evidence is so inconclusive or so inherently improbable" that reasonable persons must have entertained a reasonable doubt about the defendant's guilt. State v. Goddard, 871 P.2d 540, 543 (Utah 1994). In contrast, in reviewing decisions to bind cases over for trial, no deference is given the trial court and appellate courts conduct a de novo review. Clark, 2001 UT 9, ¶ 8, 20 P.3d 300. Given the deference afforded the jury verdict in Williams, that case has limited applicability here.

**C. Fundamental Constitutional Rights Require Evidence of the Defendant's Mental State**

Regardless of the current state of the law, allowing guilt to be inferred from the mere possession of a stolen, forged check undermines essential, fundamental rights of the accused. First, inferring guilt from mere possession violates the well-settled principle that a criminal act itself cannot supply the required mental state for a crime:

The conduct of the defendant . . . cannot be taken alone to find the defendant guilty absent the concomitant intent to achieve the

conscious objective. . . . "The law does not presume, because an assault was made with a weapon likely to produce death, that it was an assault with the intent to murder. And where it takes a particular intent to constitute a crime, that particular intent must be proved either by direct or circumstantial evidence, which would warrant the inference of the intent with which the act was done." [Thacker v. Commonwealth, 114 S.E.2d 504, 505 (Va. 1922).]

This Court has in the past acknowledged the fact that criminal intent is seldom proved by direct evidence but must be instead inferred from the circumstances of the given facts. Nonetheless, we have also cautioned that the act in itself does not raise the presumption that it was done with the specific intent required to prove the offense. All the circumstances, when taken together, must admit of no other reasonable hypothesis than that of guilt to warrant conviction. State v. Lamm, Utah, 606 P.2d 229 (1980), and cases cited therein.

State v. Castonguay, 663 P.2d 1323, 1326 (Utah 1983) (emphasis added).

Numerous courts have specifically applied these principles to the possession of a forged check and have concluded that the "act of passing as true an instrument is not one from which guilty knowledge can be inferred." Albrecht v. State, 486 S.W.2d 97, 102 (Tex. Crim. App. 1972).<sup>3</sup> Such evidence might include an alteration on the check, a name or signature that does not match, the defendant's suspicious demeanor, or taking the check for less than its value. Kihlstrom, 1999 UT App. 289, ¶ 12, 988 P.2d 949.

---

<sup>3</sup>See also State v. Maxwell, 391 P.2d 560, 562 (Ariz. 1964); Heath v. State, 382 So. 2d 391, 392 (Fla. Ct. App. 1980); State v. Martin, 341 N.W.2d 728, 730-31 (Iowa 1983); State v. Tomlinson, 457 So. 2d 651, 654 (La. 1984); State v. Phillips, 412 P.2d 205, 208 (Mont. 1966); Taylor v. State, 88 P.2d 665, 669 (Okla. Crim. App. 1939); State v. Allegra, 533 A.2d 338, 343 (N.H. 1987); People v. Mathis, 630 N.Y.S.2d 793, 794 (App. Div. 1995); State v. Mulholland, 300 A.2d 271, 272 (R.I. 1973); State v. Ravenna, 557 A.2d 484, 485 (Vt. 1988); State v. Scoby, 810 P.2d 1358, 1362 (Wash. 1991).



Second, if mere possession could sustain a forgery conviction, anyone in the check's chain of possession would be guilty of a crime. Id. at ¶ 11. A person who, for example, accepts a forged check at a yard sale could be convicted of forgery if possession alone were sufficient. Id. at ¶ 10 n. 5. Protecting persons from unjust prosecutions is particularly appropriate with respect to negotiable instruments. Millions of checks are passed everyday to transact business and to pay debts. Citizens routinely accept and pass these checks without ever assessing the checks' validity.

Third, inferring guilt from mere possession defeats an accused person's right to a presumption of innocence. Kihlstrom, 1999 UT App. 289, ¶ 10 n. 5, 988 P.2d 949. "The principle that there is a presumption of innocence in favor of the accused . . . is axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). Inferring guilt from the mere possession of a forged check essentially eliminates the presumption because the inference creates a presumption itself that the holder of the check knew of the forgery.

Checks are distinguishable from other types of property such as cars that, if stolen, create a presumption that the possessor knew or should have known of the theft. See, e.g., State v. Graves, 717 P.2d 717, 717-18 (Utah 1986) (can presume criminal intent from possession of a stolen car). In contrast to other property, checks are widely used and accepted and are routinely exchanged to transact business. For these very reasons, the law of commercial transactions establishes a presumption of innocence for persons

who take a check in good faith, for value and without notice of any defect in the instrument. Those persons are regarded as holders in due course and can rely on the validity of the check. Jaeger and Branch, Inc. v. Pappas, 433 P.2d 605, 607 (Utah 1967). Thus, "in the absence of anything to warn him [or her] to the contrary, [a holder in due course] may assume that persons with whom he deals are themselves acting honestly and in good faith." Id. But, allowing an inference of guilt from simple possession grants a holder in due course more protection from civil liability than a criminal defendant would enjoy from criminal prosecution.

Fourth, just as with the presumption of innocence, inferring guilt from the mere possession of a forged check shifts the burden of proof to the accused. Kihlstrom, 1999 UT App 289, ¶ 10 n. 5, 988 P.2d 949. Requiring the State to prove guilt beyond a reasonable doubt is "indispensable" to "safeguard[ing] [citizens] from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.'" In re Winship, 397 U.S. 358, 362 (1970) (quoting Davis v. United States, 160 U.S. 469, 488 (1895)). But, when the trier of fact may presume that a person possessing a forged check knows of the forgery, the burden of proof shifts to the defendant. State v. Ravenna, 557 A.2d 484, 485 (Vt. 1988).

Fifth, inferring guilt in this manner "chill[s] the defendant's Fifth Amendment privilege" to remain silent. Kihlstrom, 1999 UT App 289, ¶ 10 n. 5, 988 P.2d 949. Defeating the presumption of innocence and shifting the burden of proof essentially

compels criminal defendants to forfeit their right to remain silent to explain the circumstances of receiving a forged check and to prove their innocence. Id. Such was the case here when Ms. Fuller attempted to explain the circumstances of her receiving the check and then the State inferred guilt from her responses. The right to remain silent was "enshrined" in the Constitution to protect the accused from involuntary confessions and entrapping the unwitting. Miranda v. Arizona, 384 U.S. 436, 442-43 (1966).

Although there may be some logical appeal to requiring persons in possession of a forged check to explain how they received it, the dangers of doing so are well-established:

[I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into a fatal contradictions . . . demand for its total abolition.

Miranda, 384 U.S. at 442-43. As this case illustrates, the temptation for coercion is particularly strong in cases such as a forged check because the forgery provides conclusive proof that a crime has been committed.

Sixth, the inference of guilt "create[s] the danger that the unknowing and accidental passing of a forged instrument could effectively become a strict liability offense." Parks v. State, 746 S.W.2d 738, 740 (Tex. Crim. App. 1987). It is "universal and persistent in mature systems of law" that due process generally forbids a person from


being convicted of a crime absent criminal intent. Morissette v. United States, 342 U.S. 246, 250 (1952). The only exceptions to this principle concern public welfare offenses or crimes that carry only small fines. Id. at 253-56. The crimes of forgery, a third degree felony, and theft by deception, a crime punishable up to a year in jail here, fall under neither of those categories.

The preservation of these fundamental constitutional rights hinges on requiring the State to present evidence of criminal intent to convict a person of forgery for attempting to cash a forged check. Both the State and Federal Constitutions require as much. See U.S. Const. Amends. V, XIV; Utah Const. art. I, §§ 7, 12. Given the wide acceptance and use of checks, innocent persons will be convicted and imprisoned absent these protections.

### **CONCLUSION**

Ms. Fuller requests this Court to uphold the hearing judge's decision to quash the bind over and to dismiss the forgery charge.

SUBMITTED this 18<sup>th</sup> day of May, 2001.

  
\_\_\_\_\_  
KENT R. HART  
Attorney for Defendant/Appellant

**CERTIFICATE OF DELIVERY**

I, KENT R. HART, certify that I have caused to be delivered eight copies of this brief to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 18<sup>th</sup> day of May, 2001.

  
\_\_\_\_\_  
KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_ day of May, 2001.

\_\_\_\_\_